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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 902

TRAVEL CONSULTANTS, INC., *Petitioner,*

v.

TRAVEL MANAGEMENT CORP., *Respondent.*

PETITIONER'S REPLY BRIEF

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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A. None of the Questions Presented Is Fictitious

1. Whether the question of arbitrability may be referred by the District Court to the arbitrator is squarely involved. The only arbitration to which petitioner's motion for a preliminary injunction is directed is one whereby the question of arbitrability is to be heard and determined by the arbitrator (R 41). The District Court held a hearing on petitioner's motion for a preliminary injunction, not a trial to resolve the complicated and factually disputed matters involved in determining the issue of arbitrability. By holding the petitioner's motion for a preliminary

injunction to be "without merit" (R 44), and by staying petitioner's second defense and counterclaim pending arbitration, the District Court necessarily ruled that the disputed arbitrability question was to be determined by the arbitrator. To argue otherwise, as the respondent apparently attempts to, is to argue that the petitioner is entitled to no trial whatever of the issue of arbitrability.

2. Whether a breach of contract constitutes a default in proceeding with arbitration, precluding a stay under section 3 of the Arbitration Act, is a question inescapably presented. The District Court's finding that respondent was "not in default in proceeding with the arbitration" (R 43) is wholly unsupported by evidence, and does not reflect any factual determination about respondent's breach. Moreover, respondent concedes that the issue of its breach of contract under the sales agreement remains unresolved. The District Court, without hearing and determining this issue, stayed petitioner's second defense and counterclaim based upon the sales agreement, pending arbitration, and purported to do so under section 3 of the Arbitration Act (R 44). The District Court could lawfully take such summary action only if the breach of contract could not as a matter of law amount to a default precluding a stay under section 3.

3. Whether the District Court may stay litigation of a contract containing an arbitration provision, pending arbitration, when grounds exist at law or in equity for the revocation of that contract is a question directly involved in this case. That is what the District Court did, and what the Court of Appeals has reviewed. Petitioner's second defense and counterclaim (R 15), together with the uncontroverted supporting affidavits

of Mr. Nyhus (R 34) and Mr. Randall (R 36), showed respondent's breach of the sales agreement on May 31, 1964, when it discontinued the employment of Mr. Nyhus and thus made itself unable to perform its obligations under the sales agreement. Such repudiation of a contract is grounds for its revocation. Moreover, respondent's second defense and counterclaim prays for an accounting between the parties "so that their respective obligations to one another under the Stock Purchase Agreement and the Sales Agreement *and the termination of said Agreements* may be fully determined and adjudicated" (R 16-17; emphasis supplied). In the light of this, respondent's argument that "no grounds have ever been asserted for revocation of the sales agreement" is incredible.

4. The question whether the District Court should enjoin arbitration, when identical controlling issues are pending in an action before the court, is in no wise misleading, but accurately reflects a central problem posed by this case. Petitioner's verified second defense and counterclaim recites that "the principal issues involved in the arbitration proceeding are identical with those arising under the plaintiff's complaint and this counterclaim" (R 16), and Mr. Randall's uncontroverted affidavit (R 36) is to the same effect. Common both to the arbitration and the present proceedings in the District Court, and of paramount importance to each, is the factual determination whether the agreements involved in this litigation are interdependent. Thus, even though the ultimate legal issues to be resolved by the two tribunals are different, proceedings in each of the tribunals will necessarily involve presenting the same evidence, through the same witnesses, by the same counsel, for the purpose of proving the same questions of fact.

B. Respondent's Brief in Opposition Demonstrates a Further Important Reason for Granting the Writ

Although in its Court of Appeals brief respondent specifically indicated *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.,* 271 F.2d 402 (2d Cir. 1959), cert. granted 362 U.S. 909, cert. dismissed 364 U.S. 801, to be one of the cases it "chiefly relied on," respondent now disavows this reliance and asserts that its chief reliance is upon *United Steelworkers* v. *American Manufacturing Co.,* 363 U.S. 564 (1960), and upon *Drake Bakeries, Inc.* v. *Local 50,* 370 U.S. 254 (1962).

Unlike *Robert Lawrence,* these two cases do not purport to interpret the Arbitration Act with respect to commercial arbitration such as is here involved. Instead, they construe and apply section 301(a) of the Labor Management Relations Act, 61 Stat. 136, 156, 29 U.S.C. § 185, to the completely different problem of labor arbitration, a problem to which "the run of arbitration cases, illustrated by *Wilko* v. *Swan,* 346 U.S. 427" (a case chiefly relied upon by petitioner in the courts below) is "irrelevant." See *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578 (1960).

Although the two labor arbitration cases chiefly relied upon by respondent do not represent standards established by this Court for the administration of commercial arbitration, respondent's reliance upon them for this purpose is a compelling indication that they will be so used unless this Court interposes. Such a radical and avulsive change in the accepted norms governing commercial practices should be permitted, if ever, only after this Court has given plenary consideration to the matter.

C. This Case Presents Important Issues Complementary to Those To Be Argued in No. 343.

Especially in view of respondent's reliance upon labor arbitration precedents, this case presents important legal issues complementary to those in another commercial arbitration case on which this Court has granted certiorari, i.e., No. 343, *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, now awaiting argument on the summary calendar. For this reason, as well as for the reasons set forth in the petition, this petition for writ of certiorari should be granted.

Respectfully submitted,

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